Supreme Court, U.S.
FILED
NOV 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-342

IN THE
Supreme Court of the United States

October Term, 1985

THEODORE PAINTER, JR.,
Appellant,

v.

STATE OF ALASKA,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF ALASKA

MOTION TO DISMISS OR AFFIRM

HAROLD M. BROWN
ATTORNEY GENERAL

SARAH ELIZABETH MCCRACKEN
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

State of Alaska
Office of the Attorney General
1031 W. 4th Avenue, Suite 200
Anchorage, Alaska 99501
(907) 276-3550

Counsel for Appellee

BEST AVAILABLE COPY

aBCD Legal Printers, Seattle, Washington

59 P

TABLE OF CONTENTS

Page

Statement of the Case 1

1. Background 2
2. Statement of Facts 3
3. Statement of Proceedings 4

Reasons Why the Appeal Should be Dismissed 5

Summary of Argument 5

1. Review of the Alaska Court's Interlocutory Order Is Not Within This Court's Narrow "Collateral Order" Exception To The Finality Requirement . . . 5
2. The Issue Presented Does Not Merit This Court's Attention 9
   - A. The Magnuson Act Recognizes and Provides for Continued State Fisheries Management Beyond Territorial Waters 9
   - B. Mere Adoption of a Tanner Crab Fisheries Management Plan Does Not Trigger Federal Preemption 10
   - C. Continued State Enforcement of Consistent State Regulations Furthers the Purposes and Policies of the Magnuson Act 17

Conclusion 18

Appendices:

Appendix A - Alaska Tanner Crab Regulations A-1
Appendix B - State Criminal Complaint B-1
Appendix C - Alaska Statutes C-1
Appendix D - Alaska Court Rules D-1
Appendix E - Order of the Alaska Supreme Court . . E-1
Appendix F - NOAA General Counsel Opinion No. 93 . . . . . F-1

TABLE OF AUTHORITIES

Cases	Page
Anderson Seafoods, Inc. v. Graham, 529 F. Supp. 512 (D. Fla. 1982)	8
Andrews v. Virginian Railway Co., 248 U.S. 272 (1919)	7
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	5,6
Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)	6
Fidelity Federal Savings and Loan Association v. De La Cuesta, 458 U.S. 141 (1982)	11,13
Flanagan v. United States, 465 U.S. 259 (1984)	6
Florida v. Baldrige, No. 83-7071 Civ. (N.D. Fla., *dismissed* Jan. 8, 1985)	8
Florida v. Baldrige, No. 83-7380 Civ. (N.D. Fla., *dismissed* Jan. 8, 1985)	8
Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963)	11
Flynt v. Ohio, 451 U.S. 619 (1981)	7
F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), *appeal dismissed*, 454 U.S. 1130 (1981)	7,17
Hillsborough County v. Automated Medical Laboratories, Inc., 105 S. Ct. 2371 (1985)	11
Livings v. Davis, 465 So. 2d 507 (Fla. 1985)	8,10,12
Matthews v. Huwe, 269 U.S. 262 (1925)	7
Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963)	8
People v. Weeren, 607 P.2d 1279 (Cal. 1980), *cert. denied*, 449 U.S. 839 (1980)	7,8,10
Richardson-Merrell, Inc. v. Koller, 105 S. Ct. 2757 (1985)	6

TABLE OF AUTHORITIES, cont.

Cases *Page*

Roche v. Evaporated Milk Association, 319 U.S. 21 (1943) 6

Skiriotes v. Florida, 313 U.S. 69 (1941) 5,7,9, 10,13,14,*passim*

Southeastern Fisheries v. Livings, No. 83-524 Civ. (S.D. Fla. Jan. 4, 1985) 8

State v. Bundrant, 546 P.2d 530 (Alaska 1976), *appeal dismissed sub nom. Uri v. Alaska*, 429 U.S. 806 (1976) 2,7,17

State v. F/V Baranof, 677 P.2d 1245 (Alaska 1984), *cert. denied*, 105 S. Ct. 98 (1984) 8,10,11,12,*passim*

State v. Millington, 377 So. 2d 685 (Fla. 1979) 8

State v. Painter, 695 P.2d 241 (Alaska Ct. App. 1985) . . 2, 3,4

State v. Southeastrn Fisheries Association, 415 So. 2d 1326 (Fla. Ct. App. 1982) 8

State v. Sterling, 448 A.2d 785 (R.I. 1982) 8

United States Statutes

16 U.S.C. § 1801(b) 18
16 U.S.C. § 1812 12
16 U.S.C. § 1852(h) 2
16 U.S.C. § 1854 12
16 U.S.C. § 1856(a) 7,10,11,12,13,*passim*
28 U.S.C. § 1257 1,5,6

TABLE OF AUTHORITIES, cont.

Alaska Statutes

page

AS 16.05.060 3
AS 16.05.475 3
AS 16.05.720(a) 4
AS 22.05.010(d) 7
AS 22.07.030 4,7

Federal Regulations

50 C.F.R. §§ 671.1–.27 (1983) 2
50 C.F.R. § 671.1 (1983) 12
50 C.F.R. § 671.2 (1983) 3
50 C.F.R. § 671.26(f) (1983) 3
50 C.F.R. § 671.27 (1983) 3

Alaska Regulations

5 AAC 35.001–.640 (1983) 2
5 AAC 35.505(a) (1983) 3
5 AAC 35.510(1) (1983) 2,4

Court Rules

Alaska Rule of Appellate Procedure 301 4
Alaska Rule of Appellate Procedure 302 7
Alaska Rule of Appellate Procedure 304 4
Alaska Rule of Criminal Procedure 43(a) 4

TABLE OF AUTHORITIES, cont.

Other Authorities *Page*

United States Constitution, article II, clause 2 10

43 Fed. Reg. 21,174-251 (1978) 2

43 Fed. Reg. 21,175 (1978) 2

43 Fed. Reg. 21,197 (1978) 2

43 Fed. Reg. 21,199 (1978) 2

43 Fed. Reg. 21,200 (1978) 3,11

H.R. 200 14

S. 961 12,14,16

Committee on Commerce and National Ocean Policy Study, 94th Cong., 2d Sess., *A Legislative History of the Fishery Conservation and Management Act of 1976* 9,10,12,14,*passim*

Cooperative Enforcement Agreement Between the Government of the United States and the State of Alaska, Dec. 10, 1978 3,13

J. McBride, "Tanner Crab Development and Tagging Experiments 1978-1982," in *Proceedings of the International Symposium on the Genus Chionecocetes* (Univ. of Alaska 1982, Sea Grant Report No. 82-10) . . . 2

NOAA General Counsel Op. No. 93 (Jan. 19, 1981) 13

No. 85-342

IN THE
Supreme Court of the United States

October Term, 1985

THEODORE PAINTER, JR.,
Appellant,

v.

STATE OF ALASKA,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF ALASKA

MOTION TO DISMISS OR AFFIRM

Appellee, the State of Alaska, respectfully moves to dismiss the above-entitled case or, alternatively, to affirm the decision of the Alaska Court of Appeals, on the grounds that the appeal is not a final judgment under 28 U.S.C. § 1257 and that this case does not present a substantial federal question.

STATEMENT OF THE CASE

1. Background.

This appeal involves a jurisdictional challenge to enforcement of Alaska's Tanner crab management and conservation regulations beyond the state's three-mile territorial sea. Tanner crab, like king crab, migrate freely across

Alaska's territorial sea boundary during their life cycle.[1] Alaska has exercised management authority over, and has adopted regulations governing the harvest of, Tanner crab in and beyond its territorial sea since the Tanner crab fishery first developed in the late 1960's. *See* 43 Fed. Reg. 21,199 (1978).

Until 1978 there were no federal regulations governing management of the domestic Tanner crab fishery. In 1978, the North Pacific Fisheries Management Council ("NPFMC") adopted a fishery management plan ("FMP") under section 302(h) of the Magnuson Fishery Conservation and Management Act ("MFCMA" or "Magnuson Act"), 16 U.S.C. § 1852(h).[2] The federal regulations implementing the FMP at the time this case arose, 50 C.F.R. §§ 671.1--.27 (1983), were (and still are) substantially identical to state Tanner crab regulations, 5 AAC 35.001--.640 (1983).[3]

---

[1] *See* discussion of king crab biology in *State v. Bundrant*, 546 P.2d 530, 551 (Alaska 1976), *appeal dismissed sub nom. Uri v. Alaska*, 429 U.S. 806 (1976); for discussion of Tanner crab biology and migratory characteristics, *see* 43 Fed. Reg. 21,197 (1978); *see also* J. McBride, "Tanner Crab Development and Tagging Experiments 1978-1982," in Proceedings of the Int'l Symp. on the Genus *Chionoecetes* (Univ. of Alaska 1982, Sea Grant Rep. No. 82-10) at 394.

[2] Provisions of the MFCMA are set out at Appendix E to Painter's Jurisdictional Statement. The FMP was approved by the Secretary of Commerce on April 18, 1978, and was first published at 43 Fed. Reg. 21,174-251 (1978).

[3] The FMP expressly proposed that the Secretary of Commerce adopt "relevant Alaska statutes and regulations currently in force." 43 Fed. Reg. 21,175 (1978). The trial court in this case specifically found that the state and federal Tanner crab regulations were "substantially the same." *State v. Painter*, 695 P.2d 241, 242 (Alaska Ct. App. 1985). The pertinent state regulations are reprinted for the Court's convenience in Appendix A hereto; copies of pertinent federal regulations are included in Appendix F to Painter's Jurisdictional Statement.

2. Statement of Facts.

On November 17, 1983, state fish and wildlife protection officers observed the F/V Alaska Trojan, a 94-foot steel-hulled crab fishing vessel, fishing Tanner crab pots approximately 2.2 miles inside the closed waters of the Kodiak Tanner crab district, approximately six miles beyond the state's three-mile territorial sea.[4] The F/V Alaska Trojan was registered in the State of Alaska under AS 16.05.475 and was skippered by Theodore Painter, Jr., an Alaska resident.[5] The Kodiak Tanner crab district was not open to commercial fishing until February 10, 1984, nearly three months after the date of the offense. 5 AAC 35.510(1) (1983) (Appendix A-7) and 50 C.F.R. § 671.26(f)(2)(i) (1983) (Appendix F-53 to Painter's Jurisdictional Statement).

As a result of a valid search warrant executed on December 8, 1983, the state obtained vessel log data that disclosed that the F/V Alaska Trojan had harvested approximately 11,304 pounds of Tanner crab in closed waters off Cape Douglas in November and December 1983, and that the vessel had harvested approximately 1,285 Tanner crab off Narrow Cape, Kodiak Island, in April 1981, after the season had been closed by state emergency order.[6] On January 10,

---

[4] The officers were patrolling by aircraft the closed waters line off Cape Douglas, between Kodiak Island and the mainland Alaska Peninsula. The line is described in 5 AAC 35.505(a) (Appendix A-4) and 50 C.F.R. §§ 671.2 and 671.26(f). (Appendix F-7 and F-45 to Painter's Jurisdictional Statement). *See* Appendix B hereto for copy of state's complaint.

[5] *State v. Painter*, 695 P.2d 241, 242 (Alaska Ct. App. 1985); *see also* Appendix B (complaint), and Appendix C (pertinent state statutes).

[6] *See* Appendix B for copy of complaint. State officials of the Department of Fish and Game issue in-season emergency field orders under AS 16.05.060 (Appendix C); federal officials issue similar emergency orders under 50 C.F.R. § 671.27 (Appendix F-55--F-61 to Jurisdictional Statement). Federal field orders are issued in conjunction with the state, as required by 50 C.F.R. § 671.27(b); *see also* Cooperative Enforcement Agreement, n. 13 *infra*, at I-5--I-6; discussion of state-federal cooperation in Tanner crab FMP at 43 Fed. Reg. 21,200 (1978).

1984, the State of Alaska charged the vessel's captain, Theodore Painter, Jr., with six counts of illegal Tanner crab fishing under 5 AAC 35.510(1) (1983) (Appendices A-7 and B).[7] The violations are all misdemeanors for which the maximum penalty is a $5000 fine or imprisonment for not more than one year, or both. AS 16.05.720(a) (Appendix C-3).

3. Statement of Proceedings.

A magistrate (sitting as a state district court judge) in Kodiak, Alaska, granted Painter's motion to dismiss the complaint on grounds that the state lacked jurisdiction over the offenses because they occurred in the three-to-two-hundred-mile fishery conservation zone ("FCZ"). *State v. Painter,* 695 P.2d 241, 242 (Alaska Ct. App. 1985). On appeal, the Alaska Court of Appeals unanimously reversed, holding that, absent any conflict between state and federal Tanner crab regulations, state regulations (as they apply to state-registered vessels) are not preempted by the MFCMA. *Id.* The court of appeals remanded the case to the district court for trial. *Id.* at 243.

Thereafter, Painter filed a petition for hearing in the Alaska Supreme Court, seeking that court's interlocutory review.[8] On May 28, 1985, the Alaska Supreme Court denied Painter's petition without ruling on the merits. *See* Appendix B-1 to Painter's Jurisdictional Statement. On June 7, 1985, Painter unsuccessfully asked the Alaska Supreme Court to

---

[7] Painter was not taken into custody nor required to post bail. Also, since this appeal arose, the Kodiak District Attorney dismissed the 1981 violation charges under Alaska Rule of Criminal Procedure 43(a), which provides for discretionary prosecutorial dismissal. (Appendix D-5).

[8] Alaska Rules of Appellate Procedure 301 and 304, and AS 22.07.030 provide for discretionary review of a decision of the court of appeals. The Alaska Supreme Court may summarily reject the petition, or may grant the petition and set the matter on the calendar for full briefing and oral argument. *See* Alaska Rule of Appellate Procedure 304 (Appendix D-3).

stay the remand. On July 25, the court denied Painter's request for reconsideration of its order denying the stay. (Appendix E).

REASONS WHY THE APPEAL SHOULD BE DISMISSED

Summary of Argument

The interlocutory decision Painter presents to this Court is not a final decision and is not within the narrow "collateral order" exception to the finality requirement of 28 U.S.C. § 1257. The decision to remand the case for trial has no "final and irreparable effect" on the parties, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545 (1949), and thus fails to meet the jurisdictional prerequisites established by this Court.

Furthermore, the issue raised by Painter is not a substantial federal question requiring interlocutory review. The Alaska Court of Appeals carefully considered Painter's arguments and correctly decided that Alaska has jurisdiction to prosecute this action for violations of state Tanner crab conservation regulations in the FCZ.

The Alaska Court of Appeals' decision is in harmony with *Skiriotes v. Florida*, 313 U.S. 69 (1941), and follows a long line of cases that affirm the states' authority to regulate their valuable fishery resources both within and outside the traditional three-mile state territorial sea.

1. Review of the Alaska Court's Interlocutory Order Is Not Within This Court's Narrow "Collateral Order" Exception To the Finality Requirement.

Painter asks this Court to review an interlocutory ruling of the Alaska Court of Appeals that reversed the trial court's dismissal of charges for lack of jurisdiction and remanded the case for trial. The decision thus is not "final" under 28 U.S.C.

§ 1257. Painter relies on that narrow exception to the finality requirement which has allowed review of certain important, independent "collateral issues." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). However, Painter raises issues that are neither unreviewable after trial nor of sufficient importance to merit interlocutory review.

As the *Cohen* Court held, the purpose of the finality requirement is "to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results." *Id.* at 546. Accordingly, the class of cases that merit interlocutory review is small. *Id.* at 545. Only where the decision has a "final and irreparable effect on the rights of the parties" will review be granted. *Id.* This Court, in *Richardson-Merrell, Inc. v. Koller,* 105 S. Ct. 2757 (1985), recently re-emphasized the need to limit the collateral order exception to "trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal." *Id.* at 2761.

To fall within the collateral order exception, an order must, at a minimum: (1) conclusively determine the disputed question; (2) resolve an important issue completely separate from the merits of the action; and (3) be effectively unreviewable on appeal from a final judgment. *Id.* (citing *Coopers & Lybrand v. Livesay,* 437 U.S. 463 (1978)). Generally, the order must meet all three criteria. In a criminal case, this test is applied with the "utmost strictness," to avoid delays in resolution of the matter and because pretrial appellate review of criminal law issues is ordinarily inappropriate. *Flanagan v. United States,* 465 U.S. 259, 265 (1984); *Roche v. Evaporated Milk Association,* 319 U.S. 21 (1943) (no pretrial review of order denying motion to dismiss indictment for lack of jurisdiction).

Painter's appeal does not meet any of the "collateral order" criteria articulated above. First, Painter erroneously asserts that the Alaska Court of Appeals' decision is "not subject to further review in Alaska state courts." Jurisdictional Statement at 4. Assuming that Painter is convicted of the offenses at trial, he has a right to petition the Alaska

Supreme Court for discretionary review of the issue presented here. AS 22.07.030; AS 22.05.010(d); Alaska Rule of Appellate Procedure 302 (Appendices C-4 and D-1). That the Alaska Supreme Court's review is discretionary, rather than a matter of right, does not affect this Court's determination of whether the decision below is "final" in the sense of conclusively determining the issue and being effectively unreviewable on appeal from a final judgment. *See Andrews v. Virginian Railway Co.*, 248 U.S. 272, 275 (1919); *see also Flynt v. Ohio*, 451 U.S. 619, 621 (1981); *Matthews v. Huwe*, 269 U.S. 262, 265 (1925). Thus Painter fails to meet the first collateral order criterion (conclusive determination of the issue); therefore the appeal should be dismissed on this ground alone.

Second, the issue raised by Painter is not of such importance or national significance as to require interlocutory review, as discussed more fully in section 2 below. The Alaska Court of Appeals carefully considered and rejected Painter's preemption arguments and correctly found that section 1856(a) of the MFCMA expressly authorizes continued state jurisdiction over state-registered vessels, so long as state and federal regulations do not conflict. The court of appeals' decision is fully consistent with the MFCMA and its legislative history, with the position consistently taken by the Secretary of Commerce, with this Court's *Skiriotes* decision, and with a long line of state court decisions affirming the states' *Skiriotes* jurisdiction.[9] The opinion below is also consistent with decisions of those state and federal courts that have ruled specifically on the MFCMA, and there is no conflict

---

[9] *See F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980), *appeal dismissed*, 454 U.S. 1130 (1981); *State v. Bundrant*, 546 P.2d 530 (Alaska 1976), *appeal dismissed sub nom. Uri v. Alaska*, 429 U.S. 806 (1976); *People v. Weeren*, 607 P.2d 1279 (Cal. 1980), *cert. denied*, 449 U.S. 839 (1980).

in decisions regarding state jurisdiction in the FCZ so as to necessitate this Court's review.[10]

Given the insubstantial claims of error raised by Painter and the relatively small inconvenience to Painter of proceeding to trial, there simply is no "irreparable effect" on Painter's rights so as to meet the second criterion for the "collateral order" exception to the final judgment requirement (i.e., important issue separate from the merits). This case does not present the specter of long and complex litigation that might otherwise be avoided (typical of collateral order cases), such as liquidation of national banks, involving over 143 parties, presented in *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1963), cited by Painter. This is a straightforward criminal case against one individual, involving crabbing violations by one vessel. Moreover, because of the possibility that Painter could be acquitted at trial, or that if convicted, the Alaska

---

[10] *See Anderson Seafoods, Inc. v. Graham*, 529 F. Supp. 512 (D. Fla. 1983) (upholding state enforcement in the FCZ of a state prohibition against use of purse seines); *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984), *cert. denied*, 105 S. Ct. 98 (1984) (upholding enforcement of Alaska's king crab regulations in the FCZ); *Livings v. Davis*, 465 So. 2d 507 (Fla. 1985) (recognizing Florida's authority to enforce nonconflicting regulations in the FCZ against state-registered vessels); *People v. Weeren*, 607 P.2d 1279 (Cal. 1980), *cert. denied*, 449 U.S. 839 (1980) (affirming extraterritorial enforcement of California's swordfish management regulations); *State v. Southeastern Fisheries Ass'n*, 415 So. 2d 1326 (Fla. Ct. App. 1982) (affirming extraterritorial enforcement of a Florida prohibition on traps for catching saltwater finfish); *State v. Millington*, 377 So. 2d 685 (Fla. 1979) (upholding Florida landing law on minimum shrimp size); *State v. Sterling*, 448 A.2d 785 (R.I. 1982) (recognizing the authority of states to regulate fisheries in the FCZ, but finding a direct conflict between Rhode Island's yellowtail flounder restrictions and provisions of a federal fishery management plan). In addition, several United States District Court cases in Florida were recently resolved by stipulated settlements that recognize the state's authority to regulate state registered vessels in the FCZ absent a conflict with federal law. *See Florida v. Baldrige*, No. 83-7071 Civ. (N.D. Fla., *dismissed* Jan. 8, 1985); *Florida v. Baldrige*, No. 83-7380 Civ. (N.D. Fla., *dismissed* Jan. 8, 1985); *Southeastern Fisheries v. Livings*, No. 83-524 Civ. (S.D. Fla. Jan. 4,1985).

Supreme Court could review his jurisdictional arguments, a pretrial decision by this Court could result in adjudication of issues that might be "'dissipated by the final outcome of the case." *Id.* at 572 (Harlan, J., diss.) Finally, the issue presented by Painter in his appeal is reviewable after final judgment and hence does not meet the third criterion for collateral order appeals (i.e., nonreviewability). Accordingly, this appeal should be dismissed.

2. The Issue Presented Does Not Merit This Court's Attention.

As discussed above and articulated more fully below, this appeal does not involve sufficiently important legal issues separate from the merits to justify collateral order review. Moreover, even if this Court were to construe this appeal as a petition for certiorari, the petition should be denied for the same reasons set out above and because major federal questions are not at issue, as discussed below.

A. *The Magnuson Act Recognizes and Provides for Continued State Fisheries Management Beyond Territorial Waters.*

At the time Congress enacted the MFCMA in 1976, the law was well settled that the individual states had jurisdiction over fishery violations beyond their territorial seas, if the state had a legitimate interest in, and sufficient nexus with, the fishing activity. *Skiriotes v. Florida*, 313 U.S. 69 (1941). Both the express language of the MFCMA and its legislative history confirm that Congress was fully aware of the importance of state fisheries management in and beyond state territorial seas and of the need to continue sound state management in the FCZ in the absence of conflicting federal regulatory provisions. *See generally* Committee on Commerce and National Ocean Policy Study, 94th Cong., 2nd Sess., *A Legislative History of the Fishery Conservation and Management Act of 1976* ("Legislative History") 77, 328, 437, 459, 461, 677, 941 (1976). While providing for exclusive federal

fishery management with respect to *foreign* fishing activities, Congress expressly authorized continued state management and enforcement jurisdiction in the FCZ over vessels "registered under the laws" of the states. 16 U.S.C. § 1856(a).[11]

At the time Congress enacted the MFCMA, many coastal states, lke Alaska, had well established fishery management programs in the FCZ, designed to protect and conserve resources valuable to their economies. *Legislative History* at 437, 684, 846. Had Congress intended a drastic curtailment of the states' *Skiriotes* jurisdiction, it would have so indicated. Indeed, this is what the courts concluded in *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984), *cert. denied*, 105 S. Ct. 98 (1984); *People v. Weeren*, 607 P.2d 1279, 1286-87 (Cal. 1980), *cert. denied*, 449 U.S. 837 (1980); and *Livings v. Davis*, 465 So. 2d 507 (Fla. 1985). Congress has not acted to overturn Alaska's, California's, or Florida's assertions of jurisdiction in the FCZ, although it could have, had it found the states' actions to be inconsistent with the MFCMA.

B. *Mere Adoption of a Tanner Crab Fishery Management Plan Does Not Trigger Federal Preemption.*

Painter argues that the supremacy clause of the United States Constitution, article II, clause 2, requires preemption of state Tanner crab regulations by virtue of enactment of the MFCMA and the adoption of federal Tanner crab regulations. This argument ignores both the express reservation of the states' *Skiriotes* jurisdiction over vessels registered under the laws of the state under 16 U.S.C. § 1856(a), and the lack of any conflict between state and federal management provisions.

---

[11] 16 U.S.C. § 1856(a) provides:

> 16 U.S.C. § 1856(a): *State jurisdiction.*
>
> (a) In general. — Except as provided in subsection (b) of this section, nothing in this chapter shall be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. No State may directly or indirectly regulate any fishing which is engaged in by any fishing vessel outside its boundaries, *unless such vessel is registered under the laws of such State.*

[Emphasis added.]

Federal preemption is found only where there is: (1) a manifest congressional intent to preempt; or (2) where the scheme of federal regulation is so comprehensive as to leave no room for supplementary state regulation; or (3) where the field is one in which the federal interest is so dominant that the federal system is assumed to preclude state law; or (4) where state and federal laws conflict. *See Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2375 (1985). In particular, preemption of the historic police powers of a state will not lightly be inferred. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 147 (1963). None of the above circumstances of preemption exists in the present case. Congressional intent to authorize continued state jurisdiction over state-registered vessels in the FCZ is manifest in 16 U.S.C. § 1856(a). *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984), *cert. denied*, 105 S. Ct. 98 (1984). Moreover, mere implementation of a Tanner crab FMP does not trigger federal preemption, absent a conflict, as discussed below.

Although this Court has held that "[f]ederal regulations have no less preemptive effect than federal statutes," *Fidelity Federal Savings and Loan Association v. De La Cuesta*, 458 U.S. 141, 153-54 (1982), a finding of preemption by federal regulation is limited to situations in which the federal administrator *intends* to preempt state law and the federal action is consistent with the federal enabling statute and congressional intent. *Id.* This is not the case with respect to federal Tanner crab regulations, discussed below.

First, there is no indication that either the NPFMC or the Secretary of Commerce intended the Tanner crab FMP or implementing regulations to preempt state law. Both documents are devoid of any expression of intent to preempt. In fact, the FMP assumes continued state regulation in the FCZ. Section 8.3.3.3 of the FMP provides:

> Adoption of the proposed regulatory regime in this plan will be compatible with the State of Alaska's management program for its citizens outside the Territorial Sea fishing for Tanner crab and all U.S. citizens within the Territorial Sea fishing for the same resource.

43 Fed. Reg. 21,200 (1978).

Painter's argument that 50 C.F.R. § 671.1 (1983) constitutes an expression of secretarial intent to preempt state Tanner crab regulations is unfounded. That regulation specifies, in pertinent part, that federal Tanner crab regulations apply "within that portion of the Bering Sea and Gulf of Alaska over which the United States exercises exclusive fishery management authority." *Id.* (Appendix F-1 to Painter's Jurisdictional Statement). This quoted language provides no support for Painter's preemption argument. The language does not address federal preemption of state law but simply mirrors section 102 of the MFCMA, 16 U.S.C. § 1812, in which the United States asserts jurisdiction, *exclusive of other nations,* over fisheries within the FCZ.[12] Section 102 of the MFCMA, and hence 50 C.F.R. § 671.1, must be read in harmony with 16 U.S.C. § 1856(a), which continues state jurisdiction over state registered-vessels in the FCZ.

Second, the Secretary of Commerce, who is charged with implementing the MFCMA *(see* 16 U.S.C. § 1854), has taken the position (through counsel at the Department of Justice as *amicus curiae* in *State v. F/V Baranof,* 677 P.2d 1245 (Alaska 1984), *cert. denied,* 103 S. Ct. 98 (1984), and *Livings v. Davis,* 465 So. 2d 507 (Fla. 1985)), that the MFCMA contemplates continued state jurisdiction over state-registered vessels unless a *conflicting* federal plan is implemented. *See State v. F/V Baranof,* 677 P.2d at 1251; *Livings v. Davis,* 465 So. 2d at 509. This position is underscored by the federal government's participation in a cooperative enforcement agreement for FCZ fisheries, which authorizes, *inter alia,*

---

[12] *See* Appendix E-10--E-11 to Painter's Jurisdictional Statement. The Senate Committee on Commerce, chaired by Senator Magnuson (Sponsor of S. 961, precursor to the MFCMA), clarified that the exclusivity of federal jurisdiction in Secs. 101 and 102 of S. 961 referred to *foreign* nations, not to the several states:

> This authority [exclusive federal jurisdiction in the FCZ] is exclusive in the sense that *no other nation* may regulate fishing within the zone, although vessels of other nations may be allowed to engage in fishing, in accordance with the Act, within the zone.

Legislative History at 677. [Emphasis added.]

federal agents to enforce "state fishing laws and regulations which implement or complement NPFMC management plans."[13] This agreement manifests the interpretation, by the federal agency charged with MFCMA implementation, that the Act and the existence of an FMP and implementing regulations do *not* preempt consistent state regulations.

That the Secretary of Commerce does not agree with the preemption theory presented by appellant is also evidenced by a 1981 legal opinion from NOAA general counsel, which states in pertinent part (emphasis added):

> This [16 U.S.C. § 1856(a)] is a critical provision since it evidences the Congressional decision to assert federal jurisdiction in the FCZ *without fully occupying the field and thereby preserves to the states the authority to regulate their own registered vessels.* Of course, given the comprehensive nature of the federal regime, if there were any *actual conflict* between federal and state regulations directly or indirectly affecting fishing in the FCZ, the federal regulations would prevail even as to state registered vessels.[14]

In short, federal Tanner crab regulations fail to reflect any intent to preempt consistent state provisions in the FCZ. Moreover, any administrative effort to dissolve Alaska's *Skiriotes* jurisdiction absent any conflict with federal law would be incompatible with congressional intent, discussed in section 2A *supra*. *See Fidelity Federal Savings and Loan Association*, 458 U.S. 141, 153-54 (1982). Painter's references to selective portions of the MFCMA legislative history (Jurisdictional Statement at 11-13), provide no basis for inferring congressional intent to extinguish the states' *Skiriotes*

---

[13] Cooperative Enforcement Agreement Between the Government of the United States and the State of Alaska, dated Dec. 10, 1978 (Appendix I of Appellant's Jurisdictional Statement, at I-22).

[14] NOAA General Counsel Op. No. 93 (Jan. 19, 1981) at 1-6193. Appendix G hereto provides, for the Court's convenience, the pertinent sections of the opinion. The opinion is too lengthy to reproduce in its entirety.

jurisdiction, as is evident from a careful examination of the cited comments in the full context of the legislative history, discussed below.

First, Painter asserts that section 104 of H.R. 200 and section 205 of S. 961 manifested agreement by the House and Senate that states have no jurisdiction in the FCZ. This claim is supported neither by the plain language of the bills nor by the committee reports.[15] The two bill sections do not address *Skiriotes* jurisdiction, but merely clarify that the respective bills would not change the status quo of sovereign state jurisdiction. Nothing in the legislative history of the MFCMA

---

[15] Section 104 of H.R. 200 provided:

> Sec. 104. STATE JURISDICTION.
>
> Nothing in this Act shall be construed —
>
> (1) as extending the jurisdiction of any State to any natural resource beneath and in the water within the zone;
>
> (2) as diminishing the jurisdiction of any State over any natural resource beneath and in its internal waters; or
>
> (3) except as may be provided pursuant to section 309, as diminishing the jurisdiction of any State to any natural resource beneath and in the waters of the territorial sea of the United States.

Section 309 of H.R. 200 provided, in pertinent part:

> Sec. 309. STATE JURISDICTION.
>
> (a) IN GENERAL. — Except as provided in subsection (b) nothing in this Act shall be construed as extending or diminishing the jurisdiction of any State seaward of the coastline of the United States.
>
> (Subsection (b) of Sec. 309 provided for federal regulation of certain fisheries within the states' territorial seas, where necessary to insure the effectiveness of an FMP.)

Section 205 of the Senate amendment (S. 961) provided:

> Sec. 205. Nothing in this Act shall be construed to extend the jurisdiction of any state over any natural resources beneath and in the water beyond its seaward boundaries, or to diminish the jurisdiction of any State over any natural resource beneath and in the waters within its boundaries.

Legislative History at 135, 204.

suggests that Congress intended to alter the well established jurisdiction of states over fisheries beyond territorial seas, articulated in *Skiriotes*. *See* section 2A, *supra*.

Second, Painter argues that certain comments made by Senator Gravel during Senate debates on S. 961 show that Congress intended to create a zone of exclusive federal jurisdiction in the FCZ. This conclusion does not follow. Senator Gravel's proposal was to grant to the several states *primary* jurisdiction over fishing in the FCZ (not, as Painter suggests, to recognize concurrent state management authority in the FCZ). *See Legislative History* at 412-14, 422, 437, 467-71. Under Senator Gravel's amendment, the federal role would have been merely to approve management programs developed by the states. *Id.* Congress' rejection of this proposal to allow primary state jurisdiction in the FCZ does not manifest any intent to preclude concurrent state regulation of state-registered vessels as long as state regulation is consistent with the federal management scheme.

Likewise, Painter's references to comments by Senators Stevens and Magnuson do not support his preemption theory. In context, the statements of Senator Stevens (cited at page 11 of the Jurisdictional Statement) related to an amendment proposed by him to clarify that S. 961 would not enlarge or diminish the state's sovereign jurisdiction over territorial seas and fisheries. Senator Gravel, who advocated granting the states *primary* jurisdiction over FCZ fisheries, noted that the State of Alaska was exercising its authority (i.e. *Skiriotes* jurisdiction) over certain fisheries beyond the three mile territorial sea and suggested that this be addressed in the legislation. Senator Stevens clarified repeatedly that extraterritorial (i.e., *Skiriotes)* jurisdiction was not the point of his amendment, stating:

> We are not trying to resolve that. We are trying to reassure the States that nothing in this act is intended to take away from the State any jurisdiction it has now.

Legislative History at 459; *see also id.* at 460.

Similarly, the comments of Senator Magnuson do not address *Skiriotes* jurisdiction but are also directed at Senator Gravel's desire to see the states have *primary* jurisdiction over FCZ fisheries. Senator Magnuson simply emphasized that the bill (S. 961) would continue primary state management in territorial waters, stating:

> We wish to protect the right of the States to do what they think is right under the law which now exists and [sic] within the 3 miles. That is all this [S. 961] does.

Legislative History at 463; *see also id.* at 465.[16] While calling for national fisheries management standards in the FCZ, Senator Magnuson at no point indicated any intent to abolish *Skiriotes* jurisdiction, if state and federal regulations are consistent. In short, taken in context, the MFCMA legislative history does not manifest congressional intent to deprive states of their traditional *Skiriotes* jurisdiction.

Finally, Painter attempts to bolster his preemption theory by suggesting that the Alaska Supreme Court's decision in *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984), *cert. denied*, 103 S. Ct. 98 (1984), was premised on the fact that, in that case, no federal king crab regulations had been adopted. Painter thereby intimates that a contrary decision would have resulted had there been a king crab FMP in place. This is not the case. Although there was no FMP for king crab in *Baranof*, this fact was not critical to the court's reasoning and its conclusion that the MFCMA does not wholly occupy the field of FCZ fisheries. In fact, the *Baranof* court specifically noted that, since initiation of the case, the NPFMC had prepared a king crab FMP that wholly incorporated the state's regulatory scheme; the court found this to be further "strong evidence that the Alaskan regulatory regime does not stand as an obstacle to the accomplishment and execution of the purpose of the FCMA." *Id.* at 1251.

---

[16] Painter's references to 1983 amendments to the MFCMA, which resolved certain jurisdictional anomalies, are equally unavailing. The 1983 amendments and committee report comments do not address *Skiriotes* jurisdiction under 16 U.S.C. § 1856(a) but merely clarify which areas will be construed as being within territorial seas for management purposes.

In summary, Painter fails to raise any serious argument that the MFCMA or federal Tanner crab regulations preempt consistent state regulations. Moreover, as discussed below, there are strong policy considerations that weigh in favor of continued state enforcement.

C. *Continued State Enforcement of Consistent State Regulations Furthers the Purposes and Policies of the Magnuson Act.*

Alaska has a recognized legitimate interest in Tanner crab, which migrate freely across territorial boundaries, and in its Tanner crab fishery.[17] Vessels that engage in the Tanner crab fishery and that are subject to state vessel registration laws have a close nexus to Alaska. As the Alaska Supreme Court stated in *State v. Bundrant*, 546 P.2d 530, 556 n.106 (Alaska 1976), *appeal dismissed sub nom. Uri v. Alaska*, 429 U.S. 806 (1976):

> Bering Sea crabbers daily make use of Alaskan territorial waters and facilities, and probably could not continue to crab in the area without using Alaskan shore based facilities.

Accord: F/V American Eagle v. State, 620 P.2d 657 (Alaska 1980), *appeal dismissed*, 454 U.S. 1130 (1981).

From a pragmatic perspective, denial of state jurisdiction over Tanner crab cases involving nonconflicting state regulations in the FCZ would defeat the conservation and management purposes of the MFCMA. As recognized in the Cooperative Enforcement Agreement, the state already has a substantial investment in enforcement personnel, vessels, equipment, and patrol aircraft.[18] State courts exist in Dutch Harbor, Dillingham, Naknek, Kodiak, and elsewhere near the fishing grounds and in close proximity to witnesses, equipment, and enforcement personnel, and thus provide a convenient forum for issuance of warrants, adjudication of

---

[17] *See* n.1 *supra.; see also* 43 Fed. Reg. 21,199 (1978).

[18] Appendix I to Appellant's Jurisdictional Statement, at I-2--I-4.

issues relating to seizure of vessels and equipment, and trials.[19] Additionally, over the years state courts have developed a familiarity with and expertise regarding state fisheries management laws, a fact Congress surely recognized in allowing states continued management under the MFCMA.[20] To conclude that the state's jurisdiction over Tanner crab fishing is automatically preempted merely by adoption of nonconflicting federal regulations applicable in the FCZ would defeat the goals of the MFCMA itself, by placing needless roadblocks to enforcement, thereby undermining efforts to conserve and manage the fishery. *See generally* 16 U.S.C. § 1801(b).

CONCLUSION

For the reasons stated above, this appeal should be summarily dismissed. If considered as a petition for certiorari, this Court should not exercise its review authority because the order appealed from is not within the collateral order exception and because Painter does not raise substantial federal questions. Alternatively, the decision of the Alaska Court of Appeals should be summarily affirmed.

DATED this 29th day of October, 1985.

Respectfully submitted,

HAROLD M. BROWN
ATTORNEY GENERAL

SARAH ELIZABETH MCCRACKEN
ASSISTANT ATTORNEY GENERAL
Counsel for State of Alaska for Appellee

---

[19] The federal courts in Alaska, in contrast, are located in Anchorage and Fairbanks, more than 300 miles from the Bristol Bay fishing grounds, although there are part-time federal magistrates in Kodiak, Juneau, and Ketchikan.

[20] As the Alaska Supreme Court noted in *State v. F/V Baranof*, 677 P.2d at 1253, practical considerations in Alaska favor interpreting the MFCMA to allow continued state court jurisdiction over fisheries cases where state courts have traditionally interpreted and applied state law.

APPENDIX A

5 AAC 35.005 (1983)

5 AAC 35.005. STATISTICAL AREAS ESTABLISHED. (a) For the tanner crab fishery, there are established the following statistical areas with the following code letters:

Code letter

A- Southeastern Alaska-Yakutat area, comprised of the waters specified in sec. 100 of this chapter.

E- Prince William Sound area, comprised of the waters specified in sec. 300 of this chapter.

H- Cook Inlet area, comprised of the waters specified in sec. 400 of this chapter.

J- Westward area, comprised of the waters specified in sec. 500 of this chapter.

(b) Each statistical area consists of:

(1) a registration area, comprised of all the waters within the stastistical area which are territorial waters of Alaska; and (2) an adjacent seaward biological influence zone, comprised of all the waters within the statistical area which are not part of the registration area.

(c) Registration areas are areas in which the department shall apply conservation and management regulations in order to protect and maintain the tanner crab resources of the state.

(d) Adjacent seaward biological influence zones are areas which the department shall utilize to obtain biological and fishing effort data and other information necessary for the formulation of comprehensive and effective conservation and management regulations governing

crab resources inhabiting the registration area. However, regulations governing the registration area will also be applied in the adjacent seaward biological influence zone consistent with sec. 010 of this chapter.

Authority: AS 16.05.251

5 AAC 35.500 (1983):

ARTICLE 8.

STATISTICAL AREA J (WESTWARD)

REGULATIONS FOR REGISTRATION AREA

5 AAC 35.500. DESCRIPTION OF STATISTICAL AREA. Statistical area J includes all Pacific Ocean waters south of the latitude of Cape Douglas (58° 52' N. lat.), west of the longitude of Cape Fairfield (148° 50' W. long.), east of 172° E. long. and shoreward of the 400 fathom (732 m) depth contour and all Bering Sea waters east of 172° E. long.

Authority: AS 16.05.251(a)(2)

5 AAC 35.505(a) (1983):

5 AAC 35.505. DESCRIPTION OF DISTRICTS. (a) Kodiak district: all waters south of the latitude of Cape Douglas (58° 52' N. lat.), west of the longitude of Cape Fairfield (148° 50' W. long.) and east of the longitude of Cape Kumlik (157° 27' W. long.);

(1) Northeast section: all waters northeast of a line extending 145° from the easternmost tip of Cape Chiniak, east of a line from the northernmost tip of Inner Point to the southernmost tip of Afognak Point, east of 152° 30' W. long. in Shuyak Strait and east of the longitude of the northernmost tip of Shuyak Island (152° 20' W. long.);

(2) Eastside section: all waters southwest of a line extending 145° from the easternmost tip of Cape Chiniak, northeast of a line extending 168° from the easternmost tip of Cape Barnabas and

Old Harbor Narrows east of 153° 16' W. long.;

(3) Southeast section: all waters southwest of a line extending 168° from the easternmost tip of Cape Barnabas and east of a line extending 222° from the southernmost tip of Cape Trinity;

(4) Southwest section: all waters west of a line extending 222° from the southernmost tip of Cape Trinity, south of a line from the westernmost tip of Cape Ikolik to 57° 15' N. lat., 155° 30' W. long. to the southernmost tip of Cape Kilokak and east of the longitude of Cape Kilokak (156° 19' W. long.);

(5) Semidi Island section: all waters west of the longitude of Cape Kilokak (156° 19' W. long.) and east of the longitude of Cape Kumlik (157° 27' W. long.);

(6) Westside section: all waters north of a line from the westernmost tip of

Cape Ikolik, east of a line from 57° 15' N. lat., 155° 30' W. long. to 58° N. lat., 154° W. long. to 58° 51' N. lat., 152° 45' W. long., west of a line from the northernmost tip of Inner Point to the southernmost tip of Afognak Island, west of 152° 30' W. long. in Shuyak Strait and west of the longitude of the northernmost tip of Shuyak Island (152° 20' W. long.);

(7) North Mainland section: all waters north of 58° N. lat. and west of a line from 58° 51' N. lat., 152° 45' W. long. to 58° N. lat., 154° W. long.;

(8) South Mainland section: all waters south of 58° N. lat., west of a line from 58° N. lat., 154° W. long. to 57° 15' N. lat., 155° 30' W. long. and north of a line from the southernmost tip of Cape Kilokak to 57° 15' N. lat., 155° 30' W. long.

5 AAC 35.510(1) (1983):

5 AAC 35.510. FISHING SEASONS. Male tanner crab may be taken only as follows:

(1) in the Kodiak district, from 12:00 noon February 10 through 12:00 noon April 30, except in that portion of the Kodiak district from the longitude of Kilokak Rocks (156° 20' 13" W. long.) to the longitude of Cape Kumlik (156° 27' W. long.) tanner crab may be taken only from 12:00 noon February 10 through May 15;

APPENDIX B

IN THE DISTRICT COURT
OF THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT, KODIAK, ALASKA

STATE OF ALASKA

Plaintiff

vs.

THEODORE PAINTER, JR.

DOB: 02-06-47

Defendant.

---

6 COUNTS MISDEMEANOR
CRIMINAL COMPLAINT
No. 3K0-84-31 Cr.
COMMERCIAL FISHING
CLOSED SEASON
5AAC 35.510(1)

Complainant, Sergeant CRAIG SMITHSON, Fish & Wildlife Protection Officer, personally appearing before me and being duly sworn, states that on or about the 8th day of November, 1983, at or near Kodiak, in the Third Judicial District, State of

COUNT I:

Alaska, THEODORE PAINTER, JR., skipper of the fishing vessel ALASKA TROJAN, did

unlawfully commercial fish for Tanner crab; to wit: That he did take Tanner crab within the Kodiak District during a closed season.

All of which is contrary to and in violation of 5AAC 35.510(1) and against the peace and dignity of the State of Alaska.

COUNT II: COMMERCIAL FISHING CLOSED SEASON 5AAC 35.510(1)

THEODORE PAINTER, JR., skipper of the fishing vessel ALASKA TROJAN on November 13, 1983, at or near Kodiak, did unlawfully commercial fish for Tanner crab; to wit: that he did take Tanner crab within the Kodiak District during a closed season.

All of which is contrary to and in violation of 5AAC 35.510(1) and against the peace and dignity of the State of Alaska.

COUNT III: COMMERCIAL FISHING CLOSED SEASON 5AAC 35.510(1)

THEODORE PAINTER, JR., skipper of the fishing vessel ALASKA TROJAN on November

16, 1983, at or near Kodiak, did unlawfully commercial fish for Tanner crab; to wit: that he did take Tanner crab within the Kodiak District during a closed season.

All of which is contrary to and in violation of 5AAC 35.510(1) and against the peace and dignity of the State of Alaska.

/s/ Craig Smithson
(SIGNATURE OF COMPLAINANT)

Sworn to and subscribed before me this 10th day of January, 1984.

/s/ Dennis Nelson
Magistrate

(SEAL)

COUNT VI [sic]: COMMERCIAL FISHING CLOSED SEASON 5AAC 35.510(1)

THEODORE PAINTER, JR., skipper of the fishing vessel ALASKA TROJAN on November 17, 1983, at or near Kodiak, did unlawfully commercial fish for Tanner crab; to wit: that he did take Tanner crab within the Kodiak District during a closed season.

All of which is contrary to and in violation of 5AAC 35.510(1) and against the peace and dignity of the State of Alaska.

COUNT V: COMMERCIAL FISHING CLOSED SEASON 5AAC 35.510(1)

THEODORE PAINTER, JR., skipper of the fishing vessel ALASKA TROJAN on Decenber 2, 1983, at or near Kodiak, did unlawfully commercial fish for Tanner crab; to wit: that he did take Tanner crab within the Kodiak District during a closed season. All of which is contrary to and in violation of 5AAC 35.510(1) and against the peace and dignity of the State of Alaska.

COUNT IV [sic]: COMMERCIAL FISHING CLOSED SEASON 5AAC 35.510(1) Emergency Order No. 4-S-8-81 [sic].

THEODORE PAINTER, JR., skipper of the fishing vessel ALASKA TROJAN on April 6, 1981, at or near Kodiak, did unlawfully commercial fish for Tanner crab; to wit:

that he did take Tanner crab within the Kodiak District during a closed season. All of which is contrary to and in violation of 5AAC 35.510(1); emergency order number 4-S-9-81 and against the peace and dignity of the State of Alaska.

This complaint is based upon the investigation of the complainant. It is further based upon:

1. Reference Counts I thru V: The observations of Fish and Wildlife Protection Officers SCOTT GIBBENS and RICHARD DEREMER who observed the fishing vessel ALASKA TROJAN Pulling gear within the closed waters of the Kodiak District on November 17, 1983, and upon the vessels log books which revealed that between November 8 and December 2, 1983 approximately 104 Tanner crab pots were pulled within the closed waters of the Kodiak Tanner Crab District and that an estimated 11,304 pounds of Tanner crab valued at 13,565.28 dollars

was taken from the gear and sold to Alaska Fresh Seafoods in Kodiak, Alaska by THEODORE PAINTER, JR.

2. Reference Count IV [sic]: The log books of the F/V ALASKA TROJAN revealed that THEODORE PAINTER, JR. took approximately 1,285 Tanner crab from the Kodiak area northeast section with an estimated value of 2,816 dollars after the area had closed by emergency order on April 6, 1981 at 12:00 noon.

/s/ Craig Smithson
(SIGNATURE OF COMPLAINANT)

Sworn to and subscribed before me this 10th day of January, 1984.

/s/ Dennis Nelson
Magistrate

APPENDIX C

AS 16.05.060:

Sec. 16.05.060. Emergency openings and closures. This chapter does not limit the power of the commissioner or an authorized designee, when circumstances require, to summarily open or close seasons or areas or to change weekly closed periods on fish or game by means of emergency orders. An emergency order has the force and effect of law after field announcement by the commissioner or an authorized designee. An emergency order adopted under this section is not subject to the Administrative Procedure Act (AS 44.62). (§ 12 art I ch 94 SLA 1959; am § 1 ch 4 SLA 1963)

AS 16.05.475:

Sec. 16.05.475. Registration of fishing vessels. (a) A person may not employ a fishing vessel in the water of Alaska unless it is registered under the

laws of the state. Vessels registered under the laws of another state, and persons residing in another state, are not excused from this provision.

(b) The term "employ", as used in this section, shall be defined by the Board of Fisheries through the adoption of regulations under the Administrative Procedure Act (AS 44.62). The definition may include any activities involving the use or navigation of fishing vessels.

(c) The term "registered under the laws of the state", as used in this section, shall be defined by the Board of Fisheries through the adoption of regulations under the Administrative Procedure Act (AS 44.62). The definition may include any existing requirements regarding regis tration, licenses, permits, and similar matters imposed by law or regulation together with modifications of them and with any additional requirements the

board finds laws necessary to maximize the authority of the state to apply and enforce fisheries regulations under the Fishery Conservation and Management Act of 1976 (P.L. 94-265, 90 Stat. 331, 16 U.S.C. 1801 et seq.).

(d) The term "fishing vessel", as used in this section, means any vessel, boat, ship, or other craft which is used for, equipped to be used for, or of a type which is normally used for

(a) fishing, or

(2) aiding or assisting one or more vessels at sea in the performance of any activity relating to fishing, including, but not limited to, preparation, supply, storage, refrigeration, transportation, or processing. (§ 7 ch 105 SLA 1977)

AS 16.05.720(a):

Sec. 16.05.720. Penalties. (a) Except as modified by (c) of this section,

a person who violates AS 16.05.480 - 16.05.690 or the regulations of the department pertaining to commercial fisheries is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $5,000, or by imprisonment for not more than one year, or by both. . . . (§ 12 art III ch 94 SLA 1959; am § 24 ch 131 SLA 1960; am §§ 1, 2 ch 124 (SLA 1974))

AS 22.07.030:

Sec. 22.07.030. Review by supreme court. A party may apply to the supreme court for review of a final decision of the court of appeals in accordance with AS 22.05.010 and rules adopted by the supreme court. Review is in the discretion of the supreme court as set out in AS 22.05.-010(d). In this section, "final decision" means a decision or order, other than a

dismissal by consent of all parties, that closes a matter in the court of appeals. (§ 1 ch 12 SLA 1980)

APPENDIX D

Alaska Rule of Appellate Procedure 301(a):

PART III. PETITION FOR HEARING

Rule 301. Scope of Part Three.

(a) Part Three of these rules (Rules 301 through 305) applies to requests to the supreme court to exercise its discretionary jurisdiction provided in AS 22.05.010(d) to review decisions of the court of appeals.

Alaska Rule of Appellate Procedure 302(a):

Rule 302. Petition for Hearing - When Permitted.

(a) From the Court of Appeals.

(1) A peititon for hearing may be filed in the supreme court with respect to any final decision of the court of appeals, as defined in AS 22.07.030. "Final decision" includes any decision or order of the court of appeals, other that a dismissal by consent of all parties,

which closes a matter in the court of appeals, whether or not it contemplates further proceedings in a trial court. Unless specified otherwise in the particular order in question, it includes but is not limited to, opinions, memorandum opinion [sic] and judgments, orders denying petitions for review, orders denying petitions for hearing filed under AS 22.07.020 (e), dismissals on motion of the appellee or respondent, and sua sponte dismissals pursuant to Rule 511.5 or another rule.

(2) When a petition for hearing is filed under this subsection, for purposes of Part Three the supreme court is the "court of discretionary review," the court of appeals is the "imtermediate appellate court," and the court which entered the judgment which was appealed to the intermediate appellate court is the "trial court."

Alaska Rule of Appellate Procedure 304:

Rule 304. Grounds for Granting Petition for Hearing.

The granting of a petition for hearing is not a matter of right, but is within the discretion of the court of discretionary review. The following, while neither controlling nor fully measuring that court's discretion, indicates the character of reasons which will be considered:

(a) The decision of the intermediate appellate court is in conflict with a decision of the Supreme Court of the United States or the supreme court of the state of Alaska, or with another decision of the court of appeals.

(b) The imtermediate appellate court has decided a significant question concerning the interpretation of the Constitution of the United States or the Constitution of Alaska, which question has

not previously been decided by the supreme court of the state of Alaska.

(c) The intermediate appellate court has decided a significant question of law, having substantial public importance to others than the parties to the present case, which question has not previously been decided by the supreme court of the state of Alaska.

(d) Under the circumstances, the exercise of the supervisory authority of the court of discretionary review over the other courts of the state would be likely to have significant consequences to others than the parties to the present case, and appears reasonably necessary to further the administration of justice. (Supreme Court Order 439 effective November 15, 1980)

Alaska Rule of Criminal Procedure 43(a):

Rule 43. Dismissal.

(a) By Prosecuting Attorney. The prosecuting attorney may file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal shall not be filed during the trial without the consent of the defendant.

APPENDIX E

IN THE SUPREME COURT
OF THE STATE OF ALASKA

THEODORE PAINTER, JR.,
Petitioner,

vs.

STATE OF ALASKA,
Respondent.

Supreme Court No. S-885

O R D E R

[Filed and Entered Appellate Courts of the State of Alaska - Jul 30 1985]

Court of Appeals No. A-452
Superior Court No. 3KO 84-31 Cr.

Before: Rabinowitz, Chief Justice, Matthews, and Moore, Justices. [Burke and Compton, Justices, not participating.]

On consideration of the motion for reconsideration of the order of an individual justice of June 19, 1985 denying a motion a stay of remand pending appeal to the United States Supreme

Court, filed on July 2, 1985, and the opposition to the motion, filed on July 5, 1985,

IT IS ORDERED:

The motion for reconsideration is denied.

Entered by direction of the court at Anchorage, Alaska on July 25, 1985.

CLERK OF THE SUPREME COURT

/s/ David A. Lampen
DAVID A. LAMPEN

APPENDIX F

FORMAL LEGAL OPINION
OFFICE OF THE GENERAL COUNSEL
NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION

NO. 93

Supersession and Jurisdictional Operations Under § 306 of the Magnuson Act, 16 U.S.C. §1856.

Statues Interpreted: Section 306, Magnuson Fishery Conservation and Management Act, 16 U.S.C. §1856.

Written by: Reginald Whitt, GCF, and Jay S. Johnson, GCF

Date: 29 January 1981

Summary: The opinion discusses traditional forms of State management of natural resources within and beyond State boundaries and analyzed [sic] how these have been affected by the enactment of the Magnuson Act and subsequent promulgation of fishery management plan regulations.

Questions Presented:

(1) Under what circumstances may federal fisheries regulations supersede State fisheries laws?

(2) To what extent may States regulate fishing in the fisheries conservation zone (FCZ) established under the Magnuson Fishery Conservation and Management Act, 16 U.S.C. §§1801 et seq.?

Conclusions:

(1) Federal Fisheries regulations will supersede State authority over fishing:

(a) in the FCZ under the supremacy clause of the United States Constitution except as provided in (2), below, and

(b) in the territorial sea after an administrative finding that State action substantially and adversely affects accomplishment of a fishery management plan (FMP) for

a fishery predominately fished in the FCZ.

(2) A State may regulate the fishing of vessels in the FCZ only when:

(a) the vessel is "registered" under the laws of the same State; and

(b) such regulation is not inconsistent with any applicable federal regulation; and

(c) the State has a legitimate interest in the fishery; and

(d) the State regulation neither discriminates against citizens of other States nor unduly burdens the interstate commerce of the United States.

. . . .

(c) State and Federal Jurisdiction Under the Magnuson Act.

(1) The Nature of the Act.

In the Magnuson Act Congress exercised its commerce power to prohibit

foreign fishing within the boundaries of any State and to establish a comprehensive national regime for federal regulation of specified fisheries resources in the FCZ. This scheme was premised on the conclusion that a national program for fisheries conservation and management was needed, §1801(a)(6), and would operate under exclusive federal authority in and beyond the FCZ, §§1801(b)(1) and 1812, subject to the reservation of State authority specified within the Act itself, §1856.

. . . .

(ii) The Character of Supersession under the Magnuson Act.

(a) §1856(a), sentence 1.

. . . .

(b) §1856(a), sentence 2.

The second sentence of §1856(a) provides:

No State may directly or indirectly regulate any

> fishing which is engaged in by any fishing vessel outside its boundaries, unless such vessel is registered under the laws of such State.

This is a critical provision since it evidences the Congressional decision to assert federal jurisdiction in the FCZ without fully occupying the field and thereby preserves to the States the authority to regulate their own registered vessels. Of course, given the comprehensive nature of the Federal regime, if there were any actual conflict between federal and State regulations directly or indirectly affecting fishing in the FCZ, the federal regulations would prevail, 22 U.S. (9 Wheat.) 1, 210 (1824). Rath Packing, supra. The Alaska Supreme Court, in dicta, has recently acknowledged this result with respect to federal regulations

promulgated under the Magnuson Act. American Eagle, supra, n.10.

Registration as used in §1856(a) represents an alteration of prior law regarding the legitimate exercise of extraterritorial State jurisdiction under Skiriotes, supra, and Bundrant, supra. See (b)(i), (ii) and (iii). No longer may a State impose its fisheries laws in the absence of conflicting federal regulation in the FCZ based merely upon a showing of legitimate interests in the resources and the citizenship of the persons fishing or sufficient contacts between the State and noncitizens. The Magnuson Act now requires that the vessel whose fishing is to be subjected to State regulation must be "registered under the laws of such State."

(i) Registration.

. . . .

(ii) The Scope of State Jurisdiction in the FCZ.

The second sentence of §1856(a) restricts the valid exercise of State police power over FCZ fishing to situations in which:

(A) the State regulation is not inconsistent with any applicable federal fishery regulation: i.e.,

(1) there are no federal regulations for the subject fishery; or

(2) compliance with both federal and State regulation is not impossible; or

(3) the State regulation does not impede the complete accomplishment of the goals of applicable federal regulations; and

(B) the vessel from which the fishing took place is "registered" under State law; and

(C) the State's legitimate interest in its territorial sea resources justifies the direct or indirect effect of its regulation of fishing in the FCZ; and

(D) the regulation neither discriminates against vessels from other States nor constitutes an undue burden on interstate commerce or any other federal right or authority.

(iii) Police Power in the Absence of Applicable Federal Regulation.

. . . .

(iv) State Jurisdiction When Federal Regulations Have Been Promulgated.

The Weeren, Nelson and American Eagle courts are in acord [sic] that promulgation of federal regulations regarding any fishery will supersede any conflicting State regulation of FCZ fishing. E.g., Weeren, 26 Cal.3d at ___, 14 ERC at 1255; American Eagle at n.10. This supersession is automatic under the supremacy clause, U.S. Const. art VI, cl.2, and does not require the secretarial findings necessary under §1856(b) for federal regulation within a State's territorial sea.

. . . .